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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STEPHEN P. LAUER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE *FERES* DOCTRINE SHOULD BE OVERRULED SINCE THAT DOCTRINE HAS BARRED CLAIMS BY SERVICEMEN AGAINST THE UNITED STATES CONTRARY TO THE FEDERAL TORT CLAIMS ACT?

2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN REVERSING THE TRIAL COURT IN HOLDING THAT THE NAVY'S DECISION NOT TO LIGHT AN OFF-BASE PUBLIC HIGHWAY WHICH IT OWNED AND MAINTAINED PRECLUDED A SERVICEMAN'S CLAIM FOR INJURIES UNDER THE FEDERAL TORT CLAIMS ACT DUE TO THIS COURT'S HOLDING IN *SHEARER VS. THE UNITED STATES*?

3. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN HOLDING THAT THE AUTOMOBILE ACCIDENT IN WHICH PLAINTIFF WAS INJURED WAS INCIDENT TO MILITARY SERVICE AND NOT GOVERNED BY *BROOKS VS. THE UNITED STATES* AND ITS PROGENY?

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REPORT OF OPINIONS BELOW

On August 30, 1991, the District Court entered judgment in favor of plaintiff finding that the United States Government was negligent and awarded plaintiff Three Hundred Thousand Dollars ($300,000.00) in damages. The opinion is reported at 773 F.Supp. 527 (D. Puerto Rico 1991).

On July 13, 1992, the Court of Appeals reversed the result of the District Court Opinion based on the *Feres* Doctrine. *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

JURISDICTION OF THE COURT

The Opinion of the Court of Appeals was entered on July 13, 1991. This petition is taken from the final Order of the Circuit Court pursuant to 28 U.S.C. Section 1254.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 28 U.S.C. Section 2671 et sequence. This is reproduced in the appendix.

STATEMENT OF THE CASE

A. *FACTUAL BACKGROUND*

The instant case springs from an automobile accident in which Stephen P. Lauer, a member of the United States Navy stationed in Puerto Rico, was struck from the rear by a vehicle operated by another Navy personnel, Armetta Trujillo. The accident occurred on Tarawa Road, a road which is owned and maintained by the United States Naval Department and is adjacent to the Roosevelt Road Naval Base in Puerto Rico. Tarawa Road is not part of the Naval depot and is used by commercial traffic and is the principal mode of ingress and egress to the base. It is bound on one side by privately or publicly owned land. Additionally, the road connects several different civilian areas.

On the date of the accident, Lauer, whose military occupational specialty was a Builder Constructionman, was given "liberty" from Friday afternoon, October 31, 1986, to Monday morning, November 3, 1986. Within this time period Lauer was not required to report for duty nor were there any restrictions placed upon Lauer's activities by his commanding officers.

In the evening of October 31, 1986, at approximately 9:30 p.m., Lauer went to the enlisted club on base where he had something to eat and alcoholic beverages to drink and thereupon decided to go to Don's Lighthouse, a bar located off base which was frequented heavily by servicemen.

Lauer and other military personnel took a military bus to Gate No. One, the main entrance onto the base. Since the bus was not permitted off base, he and all military personnel departed the base at this location. They proceeded to walk to Don's Lighthouse using Tarawa Road. Lauer, having never left the base prior to this occasion, followed the others as they walked on the right side of the road in a northerly direction with the flow of traffic.

Tarawa Road is a two-lane asphalt surface road with a 35 m.p.h. speed limit with no lighting between Don's Lighthouse and Gate One. In addition, sidewalks or areas for pedestrians to walk upon do not exist. There is a grassy shoulder area adjacent to the road, however, it is difficult to walk upon due to the downward slope of the area and the depressions in the earth. As a result, Lauer and the other military personnel were walking on the extreme right side of the roadway.

At approximately three quarters of the roadway, Lauer was struck by a vehicle driven by Trujillo. Both the military and the civilian police arrived at the scene of the accident, whereupon it was determined that the United States Navy had jurisdiction. Lauer was unconscious and taken to the hospital by the military personnel at Roosevelt Roads. He was diagnosed with a fracture to the left fibula as well as the right fibula and sustained a hemorrhage to the right frontal lobe of the brain.

An investigation into the accident was conducted by the United States Navy. This investigation found that there were two prior accidents on Tarawa Road that year alone and it was determined that the contributing factor to the cause of the accidents was the absence of lighting

on the roadway. A Judge Advocate General Manual Investigation (JAGMAN) was conducted as part of the investigation. The investigating officer in this part of the investigation found that Lauer's injuries were not sustained in the line of duty and were due to his own gross negligence and misconduct since he had been drinking and wearing dark clothing. These findings and opinions were endorsed by the Commanding Officer of the United States Naval Forces Caribbean and the Judge Advocate and were further adopted by the United States Navy. An endorsement is a piece of correspondence which in this instance approved the Navy's findings, opinion and recommendations of the JAGMAN investigation.

Lauer treated at various Naval hospitals for the injuries sustained in the accident. Subsequent to his discharge, he applied for veteran's benefits with respect to his medical injuries sustained in the automobile accident and was denied veteran's medical benefits as a result of the findings and opinion that Lauer was not in the line of duty at the time of the incident.

B. *PROCEEDING BELOW*

Plaintiff, Stephen Lauer, filed a Complaint against the United States Government under the Federal Tort Claims Act, 28 U.S.C. Section 2671 et sequence. The United States moved to dismiss the case under the *Feres* Doctrine, claiming there was no viable theory of recovery because the injuries were sustained incident to military service. The District Court denied Defendant's Motion to Dismiss, finding that a viable claim existed.

Between June 4 through June 7, 1991, a four-day bench trial was heard before the Honorable Jaime Pieras in the United States Court for the District of Puerto Rico. On August 30, 1991, the District Court entered judgment in favor of plaintiff finding that the United States Government was negligent and awarded plaintiff $300,000.00 in damages. The District Court rejected the Navy's argument that the *Feres* Doctrine bars recovery

and found that the accident and activity of the plaintiff was not incident to his military service.

In reaching its decision, the lower court relied upon a number of cases involving automobile accidents such as *Parker v. U.S.A.*, 611 F.2d 1107 (5th Cir. 1980); *Mills v. Tucker and U.S.A.*, 499 F.2d 866 (9th Cir. 1974) and *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987) holding that if plaintiff is not engaged in activity incident to military service and not subject to any type of military supervision or control, then the claims cannot be barred. In addition, the lower court relied upon the Navy's own findings and investigation that Lauer was not in the line of duty.

On appeal, the First Circuit rejected the lower court's Finding of Fact No. 32 that Lauer was not in the line of duty as well as rejected the United States Naval investigation and naval endorsements that found Lauer not in the line of duty at the time of incident and relied upon *United States v. Shearer*, 473 U.S. 52 (1985), which spoke against "second guessing military decisions" and held that the absence of lighting of Tarawa Road was a military decision which precluded Lauer's claim under the *Feres* Doctrine.

The appellate author stated that the instant matter was not a mere automobile accident case like *Pierce v. United States, supra.* and relied upon a First Circuit opinion, *Morey v. United States*, 903 F.2d 880 (1st Cir. 1990), which the appellate court found to be directly on point.

The First Circuit Court further found that the Opinion fell within the boundary of military discipline, therefore, *Shearer* not *Mills* or *Pierce* should be followed. Cf. *Brooks v. United States*, 337 U.S. 49 (1949).

C. *REASONS FOR GRANTING CERTIORARI*

Certiorari should be granted in this case because it is the latest example in a series of cases in which a serviceman's attempt to hold the government liable under the Federal Tort Claims Act (FTCA) has been

barred by the *Feres* Doctrine even though the serviceman's activity is not incident to service.

Contrary to very specific language and legislative history, the Court in *Feres, supra.* interpreted the FTCA contrary to the intent of the Congressional framers. The effect of the Doctrine has been to deny servicemen statutory claims under the FTCA.

1. THE *FERES* DOCTRINE SHOULD BE OVERRULED SINCE THE DOCTRINE HAS BARRED CLAIMS BY SERVICEMEN AGAINST THE GOVERNMENT CONTRARY TO THE FEDERAL TORT CLAIMS ACT

In 1946, Congress passed the Federal Tort Claims Act (FTCA) which swept away much of the sovereign immunity of the United States rendering the government liable:

> "for money damages . . . for injury or loss of property, or personal injury, or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
> 28 U.S.C. Section 1346(b).

The FTCA provides in relevant part that:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . .
> 28 U.S.C. Section 2674 (1988).

However, the waiver of liability is not absolute, Congress provided for specific exceptions to the general waiver of sovereign immunity. The Act, for instance, provides that the government shall not be liable for "any claims arising out of the combatant activities of the

military or naval forces, or the coast guard, *during the time of war*". *Ibid.* 28 U.S.C. Section 2680(j). (emphasis added)

Notwithstanding the explicit terms of the latter provision, this Court in *Feres v. United States, supra.*, unanimously held that "the government is not liable under the FTCA for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Ibid.* 340 U.S. at 137. The Court determined that the military exception to the Act's waiver of immunity is considerably broader than the provision suggests.

This same conclusion was reached in two other cases that were consolidated and decided along with *Feres.*[1] In the Court's view, the common fact underlying these three cases was that each claimant, while on active duty and not on furlough, had sustained injury due to negligence of others in the armed forces. *Ibid.* 340 U.S. at 138. Under such circumstances and in light of the fact that Congress intended to compensate servicemen with veteran's benefits for the deaths and injuries of armed service personnel, the Court concluded that there could be no government liability under the FTCA. *See* 340 U.S. at 144. This holding where an injury is incident to military service became known as the *Feres* Doctrine.

The *Feres* Court in enacting the *Feres* Doctrine created a judicial exception to the FTCA which was not contemplated by the enacting Congress. In enacting such exception, the Court improperly interpreted the FTCA and exceeded its scope of authority by creating the exception.

As stated by the 9th Circuit in *Johnson v. United States,* 170 F.2d 767, 769 (1948), an examination of the Congressional record fails to produce any evidence of

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1. *Jefferson v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950); *United States v. Griggs,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

Congressional intent or policy which might guide us toward a proper interpretation of the language found in 2680(j). The Legislative history of the twelve exceptions to sovereign liability appearing in the Act is barren of Congressional observation opposite to the specific purpose of each exception. *Ibid.* However, the FTCA is couched in unambiguous language which leaves no doubt in our minds of the meaning that the legislators intended to attach to the language to be considered. The Act is a blanket renunciation of Government immunity to suit in the case of certain types of claims specifically enumerated therein and reflects a Congressional intent which is definite and certain. *Ibid.*

In interpreting a statute, if the intent of Congress is clear, that is the end of the matter, for the Court, must give effect to the unambiguously expressed intent of Congress. *See Norfolk 9 Western v. American Main Dispatchers,* 111 S.Ct. 1156, 1163 (1991) *quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. at 842-843, 104 S.Ct. at 2781. In the instant matter, the statute's terms are clear and unambiguous. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. As noted by the Court in *Brooks v. United States,* 337 U.S. 49 (1949), we are not persuaded that "any claim" means "any claim but that of servicemen". The exceptions to the FTCA are lengthy, specific and clear. If Congress intended to make an exception for servicemen, it is hard to believe that Congress did not have servicemen in mind in 1946, when this statute was passed. This is obvious from the overseas and combatant activities exceptions. *Ibid.*

This Court in *Brooks* stated that of the eighteen tort claims bills introduced in Congress between 1925 and 1935, all but two contained exceptions denying recovery to members of the armed forces. *Ibid.* 337 U.S. at 51-52. The previous exception not allowing servicemen to bring an action was no longer an exception under the 1946 FTCA.

The *Feres* Court took it upon themselves to construe the FTCA to fit, "so far as the words will comport", into the entire statutory system of remedies against the government to make a workable, consistent, and equitable whole. (e.g. Veteran Benefits Act (VBA)) *Feres, supra.* 340 U.S. at 139. It is here that the *Feres* Court exceeded its authority in interpreting the FTCA. The absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question. See *United States v. Bernstein,* 423 U.S. 303, 309, 96 S.Ct. 523, 528 (1978). It is clear that the Congressional purpose of enacting the FTCA was to impose liability upon the United States as though they were a private person. The Act was to waive immunity from recognized causes of action and not to visit the government with novel and unprecedented liabilities. *Lavitt v. United States,* 177 Fed. 2d 627 (2 C.C.A. 1949).

Thus, if Lauer were a civilian, the United States Navy would have been held liable and would not be able to escape liability under the *Feres* Doctrine. Why should the United States Navy escape liability for their negligent actions in this matter?

The *Feres* Court noted that there were few guiding materials for their interpretation of the FTCA. However, the Court, rather than adhering to the plain meaning of the statute, relied upon the fact that if the FTCA were misinterpreted, Congress possessed a ready remedy in amending the FTCA. *Feres v. United States, supra.* 340 U.S. at 138. In upholding the Doctrine, numerous courts rely upon the fact that the *Feres* Doctrine has been in existence for forty years without disruption from the legislative branch. *See e.g. Kitowski v. United States,* 931 F.2d 1526, 1529 (11th Cir. 1991) *cert. denied* 112 S.Ct. 371 (1991).

Conclusive weight should not be given to Congress' failure to respond to the *Feres* Doctrine on the theory that Congressional silence should be interpreted as

acceptance of the decision. The Supreme Court has cautioned that "it is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law". *Boy's Market v. Clerk's Union,* 398 U.S. 235, 241 (1970) *quoting Girouand v. United States,* 328 U.S. 61, 69 (1946). Therefore, in the absence of any persuasive circumstances evidencing a clear design that Congressional inaction be taken as acceptance of the *Feres* Doctrine, the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision. *Ibid.,* at 242 quoting *Helvering v. Hallock,* 309 U.S. 106, 119 (1940).

The Doctrine has been criticized by countless courts and commentators,[2] and has only been grudgingly applied, terming it unfair, illogical and arbitrary. Results have not flowed easily from the Doctrine's purported rationales. *Estate of McAllister v. United States,* 942 F.2d. 1473 (9th Cir. 1991) *cert. denied* 112 S.Ct. 1164, 117 L.Ed.2d. 411 (1992).

In upholding the Doctrine, district and appellate courts have cited to the fact that this Court has continued to apply *Feres* strictly when lower courts have sought to give the "Doctrine" more elasticity in cases where the facts were different from those considered in *Feres.* See e.g. *Kitowski v. United States,* supra. In its last decision, *United States v. Johnson,* 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d. 648 (1987) the Doctrine

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2. See, e.g., *United States v. Johnson,* 481 U.S. 681, 700, 107 S.Ct. 2063, 2074, 95 L.Ed.2d. 648 (1987) (Scalia J., dissenting and joined by Brennan, Marshall, and Stevens, JJ.) ; *Millang v. United States,* 817 F.2d 533, 535, (9th Cir. 1987) *cert. denied* 485 U.S. 987, 108 S.Ct. 1290, 90 L.Ed.2d. 500 (1988); *Monaco v. United States,* 661 F.2d 129, 132 (9th Cir. 1981) *cert. denied* 485 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d. 1284 (1982); *Atkinson v. United States,* 825 F.2d 202, 204 (9th Cir. 1987) *cert. denied* 485 U.S. 987, 108 S.Ct. 1288, 99 L.Ed.2d. 499 (1988); *Persons v. United States,* 925 F.2d 292, 294 (9th Cir. 1991); *Estate of McAllister:,* 942 F.2d 1473 (9th Cir. 1991), *cert. denied,* 112 S.Ct. 1164, 117 L.Ed.2d. 411 (1992); *Kitowski v. United States,* 931 F.2d 1526 (11th Cir. 1991) *cert. denied,* 112 S.Ct. 371, 116 L.Ed.2d. 323 (1991).

was narrowly upheld and the reason for overruling the Doctrine were clearly enunciated by Justice Scalia. Dissenting in *United States v. Johnson,* supra. Justice Scalia wrote:

> ". . . merely that bringing harmony to the law has hardly been the consequence of our ignoring what Congress wrote and imagining what it should have written. When confusion results from our applying the unambiguous text of a statute, it is at least a confusion validated by the foreplay of the democratic process, rather than what we have here, unauthorized rationalization gone wrong. We realized seven years too late that 'there is no justification for this court to read exceptions into the Act beyond those provided by Congress. If the Act is to be altered that is the function for the same body that adopted it.'" 352 U.S. at 320, 77 S.Ct. at 377. *United States v. Johnson,* supra., 107 S.Ct. at 2075.
>
> "The *Feres* Rule is now sustained only by disembodied estimations of what Congress *must have intended.* They are bad estimations at that". *Ibid.* at 2071. (emphasis added)

The rationales purported by the *Feres* Court as an embodiment of legislative intent are scant and lacking in textual support. None of the rationales justify the result in *Feres* which lead to the creation of the *Feres* Doctrine.

Since the adoption of the *Feres* Doctrine, four rationales have been advanced for maintaining the Doctrine. The first rationale, "parallel private liability" purports to be textually based on that portion of the FTCA which provides that the government will be liable under circumstances where the United States, if a private person, would be liable. 28 U.S.C. Section 1346(b) (1982). This theory argues that the foregoing provision improperly retains sovereign immunity where the case involves tortious activity unique to the government. However, as stated by Justice Scalia, many of the Act's exceptions

would be superfluous, since private individuals typically do not transmit postal matter, impose quarantines or regulate the monetary system. *United States v. Johnson, supra.,* at 2071.

The "parallel private liability" rationale became the first theoretical predicate to fall prey to criticism. The *Feres* Court suggested that the express language of the FTCA barred military claims since they lacked a parallel, or an analogy in the private sector. The Court reasoned that to interpret the FTCA otherwise would impose upon the Government novel and unprecedented liabilities, a visitation which the Court believed Congress did not intend. *Feres* 340 U.S. at 142. Despite the force of this argument, this Court later rejected the parallel private liability test in *Indian Towing Co. v. United States,* 350 U.S. 61, 66-69, 76 S.Ct. 122, 125-126, 100 L.Ed.2d. 48 (1955) and in *Rayonier, Inc. v. United States,* 352 U.S. 315, 319, 77 S.Ct. 374, 376, 1 L.Ed.2d 354 (1957).

In *Indian Towing Co., supra.* this Court concluded that it "would be attributing bizarre motives to Congress to predicate FTCA liability on the presence or absence of identical private activity". *Ibid.* 350 U.S. at 67. In *Rayonier, Inc.,* this Court delivered the final *coup de grace* by expressly rejecting the parallel private liability test as a misinterpretation of the FTCA for "the very purpose of the FTCA was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented government liability." *Ibid.* 352 U.S. at 319.

The second rationale used to justify the existence of the Doctrine has become known as the "distinctively federal character rationale". This rationale is based upon the FTCA provision which provides that "the law of the place where the act or omission occurred is to govern liability". 28 U.S.C. Section 1346(b). The *Feres* Court held that this choice of law provision militates against local tort law controlling important aspects of the distinctively federal relationship between the United States

and its enlisted personnel. *Feres, supra.* at 142-144. The *Feres* Court reasoned that:

> "perhaps it is fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury. But a soldier on active duty has no such choice . . . That the geography of an injury should select the law to be applied to his tort claims makes no sense." *Ibid.*
>
> 340 U.S. at 142-143.

This rationale rests upon the theory that uniformity should exist due to the existence of numerous state tort laws. This rationale is also misguided for in the text of the FTCA and its legislative history Congress was not concerned with uniformity. It is further clear that uniformity was not a consideration in that Congress did provide for uniformity in 28 U.S.C. Section 2680(b), 2680(i) and 2680(k).

Justice Scalia has also stated that the uniformity justification has become illusory by permitting servicemen to recover under the FTCA for injuries suffered not incident to service and permitting civilians to recover for injuries caused by military negligence. *United States v. Johnson, supra.* at 2072 .

This Court has also pointed out in *United States v. Muniz,* 374 U.S. 150 (1963), that a complete denial of any tort recovery presents far greater prejudice to the claimant than application of nonuniform state laws. *Ibid* 374 U.S. at 162.

The *Feres* Court's third rationale "the exclusivity of veteran's benefits" was initially thought to be rendered moot by this Court's decision in *Shearer v. United States, supra.* However, this Court's most recent decision in *Johnson v. United States, supra.*, seems to revive that rationale. This once again shows that this Court is trying to fit a square peg into a round hole in order to perpetuate the existence of the Doctrine. This rationale

is largely based upon the fact that servicemen who are injured or killed in the line of duty are compensated under the VBA and, therefore, the Court concluded that it was unlikely that Congress meant to permit additional recovery under the FTCA for those injured within the line of duty. *Feres*, supra. at 144.

The *Feres* Court viewed the absence of any provision to adjust dual recoveries under the FTCA and the VBA as persuasive evidence that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service. *Ibid.* By citing this silence, the *Feres* Court concluded that Congress considered the VBA an adequate and exclusive remedy and did not intend to afford servicemen a right of recovery under the FTCA.

This rationale is inconsistent with this Court's holding in *Brooks v. United States, supra.*, where this Court held two servicemen injured off duty by a civilian army employee were not barred for bringing suit against the government after receiving veteran's benefits. This Court justified this result by stating that there is nothing contained within the FTCA nor the veteran's laws providing for the exclusivity of remedy. This Court refused to call either remedy exclusive where Congress has not done so. *Ibid.* at 53. Furthermore, if Congress intended to make relief by servicemen exclusive, they would have provided a provision within the Act as they did in FTCA 28 U.S.C. Sections 2672, 2676, 2679.

In *United States v. Brown*, 348 U.S. 111, 75 S.Ct. 143 (1954) this Court again stressed that because Congress gave no indication that it made the right to compensation under the VBA exclusive, the Court allowed recovery under the FTCA. See *United States v. Johnson, supra.*, 107 S.Ct. at 2073 quoting *United States v. Brown, supra.*, at 113.

In *United States v. Johnson, supra.*, the majority Opinion has once again justified the existence of the Doctrine by stating that claimants have a remedy in that they will be compensated for injuries through veteran's

benefits instead of being able to maintain a suit against the military. The inconsistency of this rationale has been undermined by the fact that before and after *Feres* this Court permitted injured servicemen to bring FTCA suits *even though they have been compensated under the VBA. United States v. Johnson, supra.* (emphasis added)

This rationale is not only inconsistent but patently unfair as it relates to the facts of this case. If the purpose of the *Feres* Doctrine is not to allow servicemen the right of recovery under the FTCA, why did Congress not create such an exception as it did for the combatant servicemen during the time of war? *See* 28 U.S.C. Section 2680(j). As a result of the First Circuit's decision, plaintiff was not only barred from his claim under the Doctrine, but also is ineligible for veterans' benefits based on the Navy's findings that Mr. Lauer was not in the line of duty at the time of the accident.

It is clear under this rationale that our judicial system maintains a belief that the servicemen and/or his family will always have a right to seek benefits from the VBA in lieu of being able to proceed under the FTCA. In fact, this Court in *Shearer* makes reference to this line of thinking.[3]

Justice Scalia rightfully points out that the VBA has been an exclusive remedy for some service connected injuries and in some instances there has been dual recovery and some instances no recovery. *United States v. Johnson, supra.* at 107 S.Ct. at 2073. What the majority in the *Johnson* Court has failed to recognize is the fact that under this rationale, if the serviceman is not eligible for benefits due to a military decision barring such benefits, the servicemen is left without any remedy since the *Feres* Doctrine precludes a cause of action.

The instant matter is a clear example of how a serviceman can be denied both veterans' benefits and

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3. *Shearer, supra.*, refers to the fact that plaintiff Shearer's dependents are entitled to statutory veterans' benefits. *Id.* at 144-145.

can further be barred from bringing an action against the United States Navy, on the basis that the military finds that the serviceman was not in the line of duty at the time of the incident. Clearly, this was not the intent of Congress when it passed the FTCA.

In sum, "The presence of an alternative compensation system neither explains nor justifies the *Feres* Doctrine". *United States v. Johnson, supra.* at 2073, quoting *Hunt v. United States,* 204 U.S. App. D.C. 308, 326, 636 F.2d 580, 598 (1980).

The fourth rationale justifying the continued existence of the Doctrine is known as "the military discipline rationale". This rationale has today become the primary justification for the existence of the Doctrine. Simply stated this means that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* Doctrine because they are the types of claims which would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. This rationale was adopted years after the enactment of the *Feres* Doctrine, thereby suggesting that the courts were attempting to create justifications to cling to the *Feres* Doctrine.

The Court of Appeals followed this rationale in the instant matter and held that the decision to have no lighting on Tarawa Road is a military decision precluding plaintiff's claim under the *Feres* Doctrine. In analyzing the Court of Appeals' reasoning, it would seem that any claim made by a serviceman against the military under any scenario would involve the Court's delving into the military decision making process and thus barring any claim. Technically speaking, when an individual is in the military all of his (her) activities are subject to military activity and discipline. This rationale is contrary to this Court's decision in *Brooks, supra.*

As indicated by this Court's decision in *Brooks, supra.,:*

> "We are dealing with an accident which had nothing to do with the *Brooks'* army careers. Their injuries were not caused by their service except in the sense that all human events depend on what has already transpired." *Ibid.* 337 U.S. at 52.

The question the courts are left with is when is a serviceman's activity part of military duty or separate from military activity. Rather than the First Circuit relying on the lower court's and military finding that Lauer was not in the line of duty at the time of incident and that the cause of the accident was due to lack of lighting, the First Circuit chose to ignore both the judicial and military findings and conclude that the decision not to have lighting on Tarawa Road was a military decision not subject to judicial review. Although this rationale may have the strongest foundation for the existence of the Doctrine, it also can lead to results that would violate public policy and insulate the military from liability.

This Court has often said that "the doctrine of stare decisis is of fundamental importance to the rule of law". *Patterson v. McLean Credit Union,* 491 U.S. 164, 172 (1988) *quoting Welch v. Texas Dept. of Highways and Public Transportation,* 483 U.S. 468, 494 (1987). This Court in *Boy's Markets v. Clerk's Union, supra.,* states "we fully recognize the important policy considerations which militate in favor of continuity and predictability in the law". *Ibid.* at 240. Nevertheless, as Mr. Justice Frankfurter further wrote for this Court, "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing on its scope, intrinsically sounder and verified by experience". *Helvering v. Hullock, supra.* at 119.

Precedents are not sacrosanct, however, any departure from the doctrine of stare decisis demands special justification, especially when a party advocates the

abandonment of an established precedent that is based on statutory construction due to the implications of the legislative power. *Patterson v. McLean Credit Union, supra.* at 172-173.

A special justification further exists to overrule the *Feres* Doctrine since it is a "positive detriment to coherence and consistency in the law" due to inherent confusion created by the unworkable decision. *Patterson v. McLean Credit Union, supra.* at 173. *See e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977); *Swift & Co. v. Workham*, 382 U.S. 111, 124-125 (1965).

One can see from the analysis discussed in this argument the absurdity and archaic justification for the continuation of the Doctrine. It is clear that not only in this instance was there a travesty of injustice in precluding Lauer to recover Veterans Benefit and/or maintaining his cause of action, but also the inconsistency with the reasoning behind the Doctrine has resulted in numerous unequitable decisions which violate public policy and insulate the military from liability only because the serviceman is in the military at the time of the accident.

2. THE UNITED COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN REVERSING THE TRIAL COURT IN HOLDING THAT THE NAVY'S DECISION NOT TO LIGHT AN OFF-BASE PUBLIC HIGHWAY WHICH IT OWNED AND MAINTAINED PRECLUDED A SERVICEMAN'S CLAIM FOR INJURIES UNDER THE FEDERAL TORT CLAIMS ACT DUE TO THIS COURT'S HOLDING IN SHEARER VS. THE UNITED STATES

In *Shearer v. United States, supra.*, the mother of a serviceman who had been kidnapped and murdered by another serviceman while off duty and away from his base sued the United States for damages under the FTCA.

In reversing the Third Circuit, this Court held that the Doctrine depends less on the situs of the injury than on whether the suit requires a civilian court to second guess military decisions and whether it may impair military discipline.

The United States Court of Appeals for the First Circuit applied the *Shearer* holding to the instant matter stating that "the question of whether to light a highway is a military decision". (Opinion of the Court – Pg. 4) Dependent upon this conclusion, the First Circuit wrongfully concluded that the *Feres* Doctrine was a bar to recovery since the decision of the United States Navy not to light Tarawa Road would require the Court to delve into a military decision.

An analysis of cases governed by the *Feres* Doctrine arguably demonstrate valid military decisions[4] which should not be subject to judicial review. On the other hand, there are a number of decisions which are in the remotest sense subject to military discipline and activity.[5]

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4. *United States v. Shearer, supra,; United States v. Johnson, supra.; Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977); *Morey v. United States, supra.; Bozeman v. United States,* 780 F.2d 198 (2nd Cir. 1985); *Major v. United States,* 835 F.2d 641 (6th Cir. 1987); *cert. denied* 487 U.S. 1218, 108 S.Ct. 2871, 101 L.Ed.2d. 906 (1988); *Camassar v. United States,* 531 F.2d 1149 (2nd Cir. 1976); *Maw v. United States,* 733 F.2d 174 (1st Cir. 1984); *Hall v. United States,* 451 F.2d 353 (1st Cir. 1971); *Estate of McAllister v. United States,* 942 F.2d 1473 (9th Cir. 1991), *cert. denied* 112 S.Ct. 1164, 117 L.Ed.2d. 411 (1992); *Bon v. United States,* 802 F.2d 1092 (9th Cir. 1986); *Bowers v. United States,* 904 F.2d 450 (8th Cir. 1990); *Chambers v. United States,* 357 F.2d. 224 (1966); *Hass, United States v. United States,* 518 F.2d 1138 (1975); *Torres v. United States,* 621 F.2d 30 (1980).

5. *United States v. Brown,* 348 U.S. 110 (1954); *Rayonier, Inc. v. United States,* 352 U.S. 315 (1957); *United States v. Stanley,* 483 U.S. 669 (1977); *Brooks v. United States,* 337 U.S. 337 (1949); *Mills v. Tucker,* 499 F.2d 866 (9th Cir. 1974); *Parker v. United States,* 611 F.2d 1007 (5th Cir. 1980); *Pierce v. United States,* 813 F.2d 349 (11th Cir. 1987); *Downes v. United States,* 249 F.Supp. 626 (1965); *Knecht v. United States,* 144 F.Supp. 786

Here, the question of whether to light a roadway falls within the line of decisions which are in the remotest sense subject to military discipline. Tarawa Road is not located on the military base. It is a public highway which just happens to be owned and operated by the United States Navy who failed to take proper measures to light the road.

The First Circuit in reversing the trial court ignored that Court's finding of fact as to the causation of the accident. The Lower Court found that the guidelines by the American Association of State Highways and Transportation Officials (AASHTO) are the guidelines utilized in the Commonwealth of Puerto Rico with respect to the design of highways and streets. Those guidelines contain provisions and recommendations that roadways, such as Tarawa Road, should have lighting if there is pedestrian traffic and a history of prior accidents.

The Lower Court found that due to the amount of pedestrian traffic in the evening hours on Tarawa Road and the number of prior accidents, lighting should have been installed prior to the accident involving the plaintiff.

The United States Navy should not be shielded under the *Feres* Doctrine from liability for its negligence. Even assuming that a military decision was involved not to light Tarawa Road, the military by its own admission in its investigation states that the failure to light the roadway was the cause of the accident. Additionally, the record below was void of any military decision as to why the roadway remained unlighted. Accordingly, the trial court did not have to delve into the military decision making process since the military already made a determination as to the cause of the accident. If the military by its own investigation and admission made this determination, how could the First Circuit reject this decision?

NOTES *(Continued)*
(1956); *Johnson v. United States,* 704 F.2d 1431 (1983); *Troglia v. United States,* 602 F.2d 1334 (1979); *Hall v. United States,* 451 F.2d 353 (1971).

The JAGMAN investigation was an internal investigation conducted by the United States Naval Department at Roosevelt Roads into the accident which resulted in injuries to Lauer on Tarawa Road. This JAGMAN investigation resulted in findings of facts, opinions and recommendations which were endorsed by the Naval Chain of Command. Included within the investigation was a finding of fact which provided: "The security report states that this segment of roadway is very poorly lit. This is the third accident of this type in this area in the last year. Two of the accidents resulted in injury to military personnel and a third cost a member his life in which the roadway's lighting was a contributing factor". Opinion No. 7 stated "If there had been sufficient lighting on Tarawa Road, the incident may have been avoided". Additionally, the investigation recommended in Recommendation No. 4: "That the lighting on Tarawa Road be improved as soon as possible." The lower court in its findings of fact came to the same conclusions. (See A.12 and A.13)

In addition to the findings of fact, opinions and recommendations with respect to Tarawa Road, the investigators further opined in Opinion No. 5 that "Due to his gross negligence and intoxication, Lauer's injuries were incurred not in the line of duty and due to his own misconduct."

These findings were endorsed by the Commanding Officer of the United States Naval Forces Caribbean and the Judge Advocate. An endorsement is a command decision which in this instance twice endorsed the opinion that Lauer was not in the line of duty at the time of the incident. In failing to accept the JAGMAN investigation's findings of fact, opinions and recommendations, the Court of Appeals is second guessing the military and delving into their military decision making process. These assertions seem to be rather inconsistent in that the crux of the Court of Appeals' decision centers on the premises that the courts have no authority to

second guess the decision making process of the military. Therefore, the question that must be asked is how can the First Circuit disregard the Navy's finding that Lauer was not in the line of duty? It can't. Consequently, we must accept the finding of the United States Navy that plaintiff was not in the line of duty.

Although the Court of Appeals states that it is following the *Shearer* holding, in reality, the court has rejected the rationale behind *Shearer* and delved into the military decision process to find Lauer's activity incident to military service.

3. THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ERRED IN HOLDING THAT THE AUTOMOBILE ACCIDENT IN WHICH PLAINTIFF WAS INJURED WAS INCIDENT TO MILITARY SERVICE AND NOT GOVERNED BY BROOKS V. UNITED STATES AND ITS PROGENY

The Court of Appeals for the First Circuit as part of its reasoning for finding that the *Feres* Doctrine was a bar to Lauer's claim stated "this is not a mere automobile case, the question of whether to light a highway is a military decision." (opinion of Appellate Court-Pg. 4). Petitioner fails to understand the logic of the First Circuit in failing to view this incident as a mere automobile accident case governed by *Brooks, supra.*

As this Court stated, a battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would be grounds for a tort action against the United States. *Brooks, supra.* However, this automobile accident as in *Brooks* had nothing to do with the serviceman's military activity. Their injuries were not caused by their service except in the sense that all human events depend upon what has already happened. See *Brooks, supra.* at 52.

The same analysis holds true in the instant matter for the circumstances surrounding the accidents mirror one another. The servicemen involved in *Brooks* were

off duty servicemen and were remotely subject to military discipline. Here, this accident also occurred off duty with an off duty serviceman who was a pedestrian and a driver who was also a serviceman. The accidents occurred off base on public highways. The other drivers involved in the accident were also associated with the military in some way and finally, both of these cases involve activities which but for the fact that Brooks and Lauer were enlisted in the military, their accidents had nothing to do with their military careers and their injuries were not service related.

The instant matter is also similar to other automobile accident cases which rely on *Brooks.* In *Mills v. Tucker,* 499 F.2d. 866 (1974) a claim was brought against the government alleging the government's negligence in maintaining the road. The decedent was on furlough and only in the remotest sense subject to military discipline.

The roadway was maintained by the United States Navy and adjacent to the West Lock Naval Ammunition Depot. The roadway was not part of the Naval Depot. It was bounded on one side by privately owned farmland and fenced off from the base on its other side, the road is publicly used. Drivers need not pass through a gate to reach it, and it connects different civilian areas. *Ibid.* at 868. In *Mills,* the Court held that such action was not barred by *Feres* because the serviceman's activities were remotely subject to military discipline thereby his actions were not incident to service.

In *Pierce v. United States,* 813 F.2d 349 (11th Cir. 1987), plaintiff was involved in a motor vehicle accident while he was operating a civilian motor vehicle. He was struck by a Navy Recruiter while exiting a shopping center. The Eleventh Circuit held the suit was not barred because the plaintiff was involved in activities which did not threaten the military disciplinary structure. *Pierce, supra.,* at 354.

In *Parker v. United States,* 611 F.2d 1007 (5th Cir. 1980), plaintiff, an off duty serviceman on a four day

leave, was killed in a motor vehicle accident while driving his vehicle home. The accident occurred on a road maintained by the army within Fort Wood. The Fifth Circuit Court held that *Feres* did not bar plaintiff's action for the decedent was involved in activities which were personal in nature and had no interference with military discipline.

In *Johnson v. United States,* 704 F.2d 1431 (1983), two off-duty servicemen were moonlighting as bartenders at an NCO club on base. A party was held at the club and the plaintiff left with the other off-duty serviceman, who was going to take the plaintiff home. About one mile off the base, they were involved in an accident where Johnson was severely injured due to the negligence and intoxication of the other serviceman.

The court held that the fact that the serviceman was off-duty and was working at a private job as a bartender at the NCO club was sufficient to eliminate any relevant link between his activities which led to the accident.

It is clear from the facts of the instant matter that the operative facts are more favorable in this instance than the above four cases. Specifically, (1) the accident occurred off base on a road that connected with other civilian highways and on a road in which there was concurrent jurisdiction with the Town of Ceiba; (2) that Lauer was on liberty status at the time of the incident and was not subject to any type of military control and was free to do what he wished off base for a three-day period; (3) that Lauer was on Tarawa Road for his own personal benefit was fortuitous and not directly related to military service; and (4) that Lauer's activities could not harm the disciplinary system or judgment in that he was subject to military discipline in the remotest sense since he was off-duty and left the base and was no longer under military control.

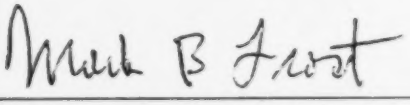
In sum, there is no relevant relationship between Lauer's behavior and the military interest that might be jeopardized by civil suits and, thus, the *Feres* Doctrine cannot be a bar to his recovery.

CONCLUSION

For the reasons stated above, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARK B. FROST & ASSOCIATES

By 

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-2224

STEPHEN P. LAUER,
Plaintiff, Appellee,

v.

UNITED STATES OF AMERICA,
Defendant, Appellant.

JUDGMENT

Entered: July 13, 1992

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and as argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The Judgment of the district court is reversed.

By the Court:

Clerk.

[cc: Messrs. Sturgill, Frost]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-2224

STEPHEN P. LAUER,
Plaintiff, Appellee,

v.

UNITED STATES OF AMERICA,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., *U.S. District Judge]*

Before
Breyer, *Chief Judge,*
Aldrich and Coffin, *Senior Circuit Judges.*

Lowell V. Sturgill, Jr., Appellate Staff, Civil Division, Department of Justice, with whom *Stuart M. Gerson,* Assistant Attorney General, *Daniel F. Lopez-Romo,* United States Attorney, and *Robert S. Greenspan,* Appellate Staff, Civil Division, Department of Justice, were on brief for appellant.

Mark B. Frost with whom *Herbert W. Brown* was on brief for appellee.

July 13, 1992

ALDRICH, *Senior Circuit Judge.* On Friday afternoon, October 31, 1986, Federal Tort Claims Act, 28 U.S.C. § 26741 plaintiff Stephen P. Lauer, a Naval enlistee stationed at the Roosevelt Roads Naval Station in Puerto Rico, became at liberty until Monday morning.

He remained at the base, but in the evening, after some beers, he joined a number of others to take a bus, where he drank more, to No. 1 Gate, and then set out to walk to Don's Lighthouse, a public bar frequented by servicemen. This meant a long walk along Tarawa Road, an asphalt road owned, maintained, and patrolled, by the Navy because it was a main access to the base. There was no sidewalk, but a grassy shoulder. The shoulder was uneven and sloping, so that it was customary to walk on the road. Plaintiff was with a group, some of whom walked ahead of him, but all were on the right side, with the flow of traffic. Rejecting the testimony of the driver of the car that ultimately struck plaintiff, who said that plaintiff was in the middle of the road, and of a serviceman who said that he had three times called to plaintiff, who "had some difficulty walking," to leave the middle, the court found that plaintiff was on the far right.[1] Wherever plaintiff was, the road was unlighted, and the driver of the automobile coming from behind at a proper rate of speed did not see him soon enough to avoid a serious contact. Plaintiff blames this on the Navy's negligence in failing to light the road.

The court found negligence, and the sole question on the government's appeal is whether plaintiff's claim must fail in light of *Feres v. United States,* 340 U.S. 135 (1950). After a discussion of the policy reasons applicable to military personnel the *Feres* court "conclude[d] that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. The district court, noting that the JAGMAN decision, n.1, ante, had denied plaintiff

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1. While the issue is not before us, the court also rejected the Navy's JAGMAN investigation findings of gross negligence because of intoxication and "walking with the flow of traffic which is incorrect for pedestrian traffic," and found plaintiff not guilty of contributory negligence. It stated that this was plaintiff's first time on the road, and he could not walk further over due to the fact that a British sailor was on his right.

Veterans benefits because his injuries were not incurred "in the line of duty,"[2] equated this phrase with *Feres*' "incident to service;" viz., plaintiff was not service-barred. 773 F. Supp. 527, 533 (D.P.R. 1991).

Finding this equivalency was error, the latter phrase is manifestly more inclusive.[3] Also error was the court's statement that we had held in *Morey v. United States,* 903 F.2d 880 (1st Cir. 1990), "that the act of walking away from one's station of duty while on liberty, renders accidents which occur, 'not incident to military service.' " 773 F. Supp. at 533. We did not. Rather, we held that "returning to his ship was an activity incident to military service, despite the fact that he was returning from nonmilitary activity," 903 F.2d at 882, and made no suggestion that departing for would differ from returning from.

Following *Feres,* courts have observed the importance of having military discipline unreviewable by courts. *Mills v. Tucker,* 499 F.2d 866 (9th Cir. 1974). Conduct of the military, however, goes far beyond discipline in the narrow sense. In *United States v. Shearer,* 473 U.S. 52, 57 (1985), the Court spoke against "second guess[ing] *military decisions* and whether the suit might impair essential military discipline." (Emphasis supplied). This is not a mere automobile accident case, *see, e.g., Pierce v. United States,* 813 F.2d 349 (11th Cir. 1987); the question of whether to light a highway is a military decision. *Morey* is directly in point. There we

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2. "5. Due to his gross negligence and intoxication, BUCA Lauer's injuries were incurred not in the line of duty and due to his own misconduct."

3. incident: occurring or likely to occur, esp. as a minor consequence or accompaniment; associated or naturally related.

Webster's Third Internat. Dict.

Compare,

incidental: likely to happen or naturally appertaining (usually followed by *to*).

Random House Dict.

held barred a claim that the Navy failed to provide sufficient patrols around a pier and hence failed to rescue plaintiff when he fell off when returning to his ship. We said, 903 F.2d at 882,

> Morey's other contention, that the Navy was negligent or reckless in failing to provide sufficient security around the pier, likewise implicates questions of military decision making, such as the proper allocation of security forces and the proper supervision of such forces.

To continue with incident to service, and the alleged difference between leaving for recreation and returning therefrom, liberty recreation is part of the normal everyday life of a serviceman. This does not mean that all recreation is incident to service, *cf. Rodrigue v. United States,* decided this day (swimming, 25 miles from base), but traveling for that purpose on a road appurtenant to the base was exactly what the Navy anticipated and had decided how to provide for. We compare *Mills v. Tucker, ante.* There a serviceman returning to his base while on furlough suffered an automobile accident allegedly due to a defective road maintained by the Navy. The road was used as a public way and served not his base, but other Naval property. In holding that his travel thereon was not incident to service the court reasoned that he was not "subject to ultimate military control." Using this test the Ninth Circuit would decide here on the basis of whether the serviceman was inside or outside the gate. *Coffey v. United States,* 455 F.2d 1380 (9th Cir. 1972) (per curiam affirming on opinion below). We do not believe such control to be the *Feres* test, *see Shearer, ante,* as we demonstrated in *Morey,* although actually we would have reached the *Mills* result. *The Mills* road was independent of the serviceman's base, and he was using it as a member of the general public. *Cf. Brooks v. United States,* 337 U.S. 49 (1949). Here the court was reviewing what plaintiff had been directly

supplied as a serviceman. Its adequacy was not for the court to measure.

Reversed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
TO FRCP RULES 58 & 79a

CIVIL NO. 89-1649 (JP)

STEVEN P. LAUER

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

JUDGMENT

By virtue of this Court's Opinion and Order, entered on this date, it is hereby ORDERED, ADJUDGED and DECREED that Judgment be entered in favor of plaintiff as follows:

$150,000.00 For past pain and suffering with relation to the plaintiff's fracture of right tibia and fibula; fracture of left fibula; brain hemorrhage; brain contusion; brain concussion; contrecoupe brain injury; permanent brain damage; and permanent cognitive dysfunction.

$150,000.00 For present and future pain and suffering with relation to plaintiff's: 1) fracture of right tibia and fibula and left fibula resulting in permanent inability to stand for long periods of time or walk for long periods without pain; 2) brain injuries resulting in permanent destruction of brain calls which controlled plaintiff's functional abilities and cognitive functional abilities; 3) cognitive dysfunction resulting in permanent inability to recall recent events, short

term memory deficits, inability to recall words and communicate knowledge, difficulty in sequencing visual events.

IT IS SO ORDERED AND ADJUDGED.

In San Juan, Puerto Rico, this 30 day of August, 1991.

JAIME PIERAS, JR.
U. S. DISTRICT JUDGE

S/C:OB
H. Brown
M. Frost
I. Muñoz
Duy

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 89-1649 (JP)

STEVEN P. LAUER

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

OPINION AND ORDER

Plaintiff, a United States Naval Serviceman, brought a negligence action under the Federal Tort Claims Act, 28 USC §2671, et seq. Plaintiff was a pedestrian on liberty walking on Tarawa Road which was owned and maintained by the United States Navy when he was struck by a motor vehicle and fractured his left tibia and fibula, his right fibula, suffered a right frontal lobe brain hemorrhage and other concomitant brain injuries. The accident occurred at nighttime and plaintiff alleged that the defendant had a duty to provide lighting and/or a sidewalk area for pedestrians and that the failure to provide same, caused the accident. In answer to plaintiff's complaint, defendant alleged that it did not have a duty to provide walkways or lighting for the road in question and that plaintiff's action was barred due to both his own contributory negligence and as a result of the Feres Doctrine.

The requisite Initial and Pretrial Conferences were held and a Non-Jury Trial was conducted on June 4, 1991. Based on the evidence presented by the parties and after due deliberation, this Court now makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. Steven P. Lauer enlisted into the United States Navy in June of 1985.

2. After going through basic training and receiving special training in the areas of construction, plaintiff was deployed with his construction battalion from Mississippi to Roosevelt Roads, Puerto Rico, in August of 1986.

3. Plaintiff's typical workday was from 7:00 a.m. to 3:30 p.m. After work plaintiff was free to do as he chose until the following morning when he was required to report for duty. He could go anywhere he wanted outside of the base and did not have to check in until reporting to work the next morning.

4. On Friday, October 31, 1986, plaintiff finished work at 3:30 p.m., and was on liberty until Monday morning, November 3, 1986.

5. There were a number of recreational facilities on base which served alcoholic beverages to military personnel. While on base the evening of October 31, 1985, the plaintiff had a few beers and something to eat and decided to go to a bar off base known as Don's Lighthouse.

6. At approximately 11:30 p.m., plaintiff took a military bus on base which dropped him and other servicemen off at Gate No. 1 at the Naval Station at Roosevelt Roads.

7. Tarawa Road is a two-lane asphalt surface road with a 35 m.p.h. posted speed limit and is the main road to go into and to leave the base.

8. Tarawa Road is owned, maintained, and operated by the United States Navy.

9. Tarawa Road is not on the Naval Base at Roosevelt Roads.

10. Tarawa Road in well-traveled by military personnel because it is the main road for egress and ingress to the base.

11. Tarawa Road between Gate No. 1 and Don's Lighthouse has no lighting and sidewalks or areas for pedestrians to walk. Although there was a grassy shoulder area adjacent to the road, the grass sloped downward and was full of depressions and holes.

12. Navy and other military personnel would exit at Gate No. 1 to walk to Don's Lighthouse which was a local bar frequented by military personnel.

13. The United States Navy knew that military personnel would walk to Don's Lighthouse frequently and that the road was well-traveled by pedestrians prior to the accident.

14. Prior to October 31, 1986, the plaintiff had never walked on Tarawa Road.

15. At approximately 11:30 p.m., plaintiff upon getting off the bus proceeded to walk in a northerly direction on the extreme right-hand edge of the road with other military personnel.

16. Plaintiff was walking on Tarawa Road with a British sailor who was to the right of him and proceeding north in the same direction as traffic.

17. The plaintiff was following other military personnel who were also walking on Tarawa Road and were walking in a northerly direction on the right side of the road.

18. A large number of military personnel were walking on the edge of the road and were not walking in the grassy shoulder area because it was difficult to see in the dark and the shoulder area had depressions, holes, and sloped down.

19. Plaintiff was three quarters of the way to Don's Lighthouse when he was struck from the rear by a vehicle operated by Armetta Trujillo, another military officer, who was travelling at approximately 30 m.p.h., which is an average speed in this community.

20. As a result of the impact, plaintiff went over the hood and the windshield of the striking vehicle and landed on the extreme right side of the roadway and shoulder area.

21. Armetta Trujillo operated a 1977 Grand Prix. The right headlight and windshield were damaged on the vehicle as a result of the accident.

22. Trujillo could not see the plaintiff until impact or immediately before impact because it was dark and there was no lighting on the road.

23. At the time of the impact, the plaintiff was rendered unconscious and was taken by military personnel to the hospital at Roosevelt Roads.

24. Plaintiff was diagnosed with a fracture to the left tibia and fibula as well as to the right fibula as well as sustaining a right frontal lobe hemorrhage. The CT Scan showed permanent brain damage to the right frontal lobe area. The injury to the left tibia required a surgical procedure known as an open reduction limited internal fixation of the left tibia due to the severe break in the tibia. During the procedure, three screws were placed in the leg which will remain in the leg permanently.

25. The investigation conducted into the accident by the Navy, found that there were two previous accidents on Tarawa Road in the year of 1986 in which the roadway's lighting was a contributing factor to the cause of the accident.

26. Guidelines by the American Association of State Highway and Transportation officials are guidelines utilized in the Commonwealth of Puerto Rico with respect to the design of highways and streets. Those guidelines contain provisions and recommendations that roadways, such as Tarawa Road, should have lighting if there is pedestrian traffic and a history of prior accidents.

27. Due to the amount of pedestrian traffic in the evening hours on Tarawa Road and prior accidents, lighting should have been installed prior to the accident involving the plaintiff.

28. Due to the lighting conditions on Tarawa Road, Armetta Trujillo was unable to see the plaintiff within a safe stopping distance.

29. An investigation was conducted into the accident involving the plaintiff wherein Findings of Fact, Conclusions and opinions were found by the investigation officer.

30. This portion of the investigation is referred to as a JAGMAN (Judge Advocate General Manual Investigation).

31. Finding No. 53 states: "The Security Report states that this segment of roadway is very poorly lit. This is the third accident of this type in this area in the last year. Two of the accidents resulted in injury to military personnel and a third cost a member his life in which the roadway's lighting was a contributing factor".

32. The Navy found in its JAGMAN investigation that plaintiff was grossly negligent and that the injuries were incurred not in the line of duty and due to plaintiff's own misconduct.

33. This finding was endorsed by the Commanding Officer of the United States Naval Construction Battalion and by the Commander of the United States Naval Forces Caribbean and the Judge Advocate's Office.

34. The endorsement is a Command decision and the Commanding Officers and the Department of Navy found that the plaintiff was not in the line of duty at the time of the accident. Accordingly, the United States Navy adopted all recommendations, opinions and findings of the investigation into the accident involving the plaintiff.

35. Although the endorsement requested that the plaintiff receive a misconduct hearing with respect to the findings of the Naval investigation, no misconduct hearing was ever conducted with respect to this incident.

36. During the investigation and subsequent thereto, the Navy failed to meet requirements of Section 0306 and 0308 of the JAG Manual which refer to advice as to the statement of injuries and Privacy Act Advice Statements.

37. Due to the magnitude of plaintiff's injuries, the plaintiff was transferred on December 1, 1986, from Roosevelt Roads to United States Naval Hospital at Bethesda, Maryland.

38. A Medical Board determined on January 12, 1987, that due to the injuries sustained in the accident that the plaintiff be put on a limited duty status for a six-month period.

39. Sometime in April, 1987, the plaintiff was transferred from Bethesda to the Naval Station at Anacostia, Maryland.

40. From the date of the injury until plaintiff's transfer to Anacostia, plaintiff's left leg was always casted. Plaintiff was further receiving medical treatment for his head injuries.

41. Plaintiff was informed at the time of the transfer that there was no light duty or limited duty jobs available and was required to do heavy construction work in accordance with plaintiff's military occupational specialty.

42. The plaintiff complained that he could not perform this work due to the injuries that he sustained and the fact that he was on limited duty.

43. The magnitude of the fracture to the left tibia was so severe that this injury in and of itself was totally disabling for a period of at least one year and this injury required physical therapy for at least eight to nine months. The physical therapy was not rendered to the plaintiff while he was in the military.

44. The United States Navy violated the findings of the Medical Board by ordering plaintiff to perform duties contrary to the Medical Board's Order. .

45. While at Anacostia, the plaintiff continued to complain to his military superiors concerning his work assignments and his inability to perform same.

46. That plaintiff's superiors made him feel that he was worthless and inferior dus to the fact that he was unable to perform his duties. As a result of the degrading

treatment that plaintiff received from his military superiors, he committed a suicide gesture with an overdose of medication, in addition to going A.W.O.L. for twenty-six days.

47. On September 3, 1987, shortly after plaintiff's return from being an unauthorized absence, plaintiff agreed to a military separation classification – "other than honorable conditions". Plaintiff was never advised of his rights with this type of separation and did not knowingly waive his rights and benefits by accepting this type of discharge.

48. In January, 1988, after the plaintiff's discharge from the military, the plaintiff applied for veteran's benefits with respect to his medical injuries sustained in his automobile accident.

49. The Veterans' Administration's denied plaintiff's application because the incident was found not to be in the line of duty and because the injury was a result of plaintiff's own misconduct.

50. At the time of his discharge and subsequent thereto, the plaintiff experienced pain and discomfort in his left leg and back due to the injuries sustained in his accident. Plaintiff further exhibits problems with respect to headaches, memory loss, lightheadedness, blurred vision, and ringing in the ears due to the head injuries sustained in the accident.

51. Examination by the governments' own doctors verified that the brain was damaged in the frontal lobe due to a frontal lobe hemorrhage and a brain contusion in the form of a contrecoup injury which affected the frontal and temporal regions of the brain. That the plaintiff further sustained a post-concussion syndrome as a result of the accident.

52. Neuropsychological testing was performed which further exhibited that the plaintiff sustained brain damage to the areas injured in the automobile accident. This testing corroborated that the plaintiff suffered memory loss, headaches, problem solving difficulties and other cognitive dysfunctions.

53. Plaintiff's injuries both to the brain and to his left leg diminish his ability to work and will require vocational counselling and rehabilitation for plaintiff to be able to perform meaningful jobs in society.

54. Plaintiff's injuries to his left leg and brain are permanent in nature and will require future medical treatment.

55. The injuries caused by the accident are disabling and plaintiff will have a diminished earning capacity due to the injuries sustained in the accident.

56. Plaintiff has worked various jobs since his discharge and was caused to leave each due to headaches, memory loss and injuries to his leg and back which affected his ability to work.

57. Based upon the expert testimony of Civil Engineer John Posusney, the Court finds that the United States Navy was negligent in failing to provide lighting and a sidewalk area and/or designated area on the shoulder of the road for pedestrians to walk. Tarawa Road was the type of street that due to the volume of military pedestrian traffic in the evening hours and the amount of prior accidents, the United States Navy should have installed lighting and an area for servicemen to walk for the safety of pedestrians as well as drivers and the failure to do same was negligent and the causation of the accident. If lighting had been installed, Armetta Trujillo would have observed the plaintiff earlier and would have been able to stop her vehicle within a safe breaking distance to prevent the accident. The accident occurred on the extreme right-hand side of the roadway approximately three feet from the shoulder of the road.

58. Based upon the testimony of orthopedic surgeon [illegible] Badrena the Court finds that plaintiff sustained a fracture to the left tibia and left fibula and a fracture to the right fibula. Plaintiff sustained an extremely severe fracture to the left tibia which required surgery – a spiral fracture, where the bone was fractured in at least three places and did damage to the

adjoining muscles and tissues. The injury was permanent in nature and the plaintiff will experience back and leg pain resulting from this accident in the future.

59. Based upon the testimony of neurologist, Dr. Arbona, the Court finds that the plaintiff sustained permanent brain damage due to a frontal lobe hemorrhage and a brain contusion in the form of a contrecoup injury which affected the frontal and temporal regions of the brain. As a result of these injuries, the plaintiff has a permanent post-concussion syndrome and that plaintiff's complaints of headaches, memory loss, lightheadedness, blurry vision, and ringing in the ears is consistent with the injuries sustained in the accident and are permanent in nature.

60. Dr. John Gordon is a neuropsychologist, who performed a series of tests on the plaintiff, the findings of which the Court hereby adopts. These tests demonstrated evidence of impairment to the brain and specifically to the areas of the front and temporal regions of the brain which control memory and intelligence areas. It was demonstrated that the plaintiff tested below average and retarded in many areas of intelligence including word retrieval, problem solving and memory. The tests further verified that plaintiff's injuries are consistent with the damage to the areas of the brain that were involved in the accident.

61. The plaintiff will need vocational counselling and rehabilitation to be able to work since his cognitive dysfunctions will affect not only his daily life but his ability to perform duties at work. Therefore, plaintiff's injuries are permanent in nature and will require future medical treatment; plaintiff's injuries to his head caused cognitive dysfunctions with respect to the brain which are permanent in nature; and the injuries to his left leg and brain caused by the accident are disabling and will have a diminished earning capacity due to the injuries sustained in the accident.

II. CONCLUSIONS OF LAW

In *Feres v. United States,* 340 U.S. 135, 138, & 146 (1950), the Supreme Court held that the only time the United States Government is liable to members of the military who sustain injuries, is when those injuries are not incurred in the course of activity which is incident to military service. This Doctrine has come to be known as the Feres Doctrine and it requires the Court to determine whether a serviceman and in this instance, the plaintiff, was in the line of duty at the time of injury. If the serviceman/plaintiff was not in the line of duty at the time of injury, the Feres Doctrine would not be a bar to Federal Tort Claims Act (FTCA) claims.

The First Circuit held in a factually similar case, *Morey v. U.S.,* 903 F.2d 880 (1st Cir. 1990), that the act of walking away from one's station of duty while on liberty, renders accidents which occur, "not incident to military service". The Feres Doctrine is not a bar to plaintiff, Steven Lauer's, FTCA claim, since the plaintiff was not in the course of activity and/or in the line of duty incident to military service at the time of the accident. Furthermore, the United States Navy found plaintiff was not acting in the line of duty at the time of his motor vehicle accident; and the endorsements by the military Chain of Command specifically found plaintiff was not acting in the line of duty at the time of his motor vehicle accident. *See Parker v. U.S.A.,* 611 F.2d 1007 (5th Cir. 1980); *Mills v. Tucker & U.S.A.,* 499 F.2d 866 (9th Cir. 1974); and *Pierce v. U.S.A.,* 813 F.2d 349 (11th Cir. 1987). Plaintiff was not in the line of duty or engaged in activity incident to his military service at the time of his motor vehicle accident when walking along Tarawa Road toward a local bar while on a two and one-half day liberty. (*See Parker,* supra.) Plaintiff's action on Tarawa Road while on liberty did not subject him to any type of military supervision, control or discipline. (*See Parker,* supra.) The United States Navy by finding the plaintiff's

conduct to be grossly negligent in the JAGMAN investigation made a determination that plaintiff was not in the line of duty and the injuries were not incurred in the course of activity incident to military service. Plaintiff was denied Veteran's benefits as a result of the fact that his injuries were determined not to have been sustained while plaintiff was in the line of duty, he is thus permitted to pursue a FTCA suit and not barred by the Feres Doctrine. (See *Johnson v. U.S.*, S. Ct. 2063, 2065 (1987)).

Whether the United States in liable for negligence of its employees is a question of state law. 28 U.S.C. § 1346(b), 2674; *United States v. Orleans*, 425 U.S. 807, 813, 96 S. Ct. 1971, 1975, 48 L.Ed. 2d 390 (1976); *Rodriguez v. U.S.F.*, 2d 940, 941-42 (1st Cir. 1972). Article 1802 of the Civil Code of Puerto Rico is the general source of law that governs the determination of liability of an individual for a cause of action in damages for negligence. 31 L.P.R.A. § 5141. Under Puerto Rican law, a duty also exists to maintain public highways in a manner that comports with providing the traveling public sufficient protection. *Morales v. Castro, et al.*, 85 P.R.R. 275, (1962).

The United States Government was negligent for the following reasons: it did not utilize the guidelines of the American Association of State Highway and Transportation officials (ASHTO) in building and maintaining the road; the amount of military traffic at nighttime on Tarawa Road and the number of prior accidents wherein lighting was a contributing factor for the causation of the accident warranted the installation of luminaries; and for its failure to maintain an appropriate area for military personnel to walk. Furthermore, the United States Navy was negligent in its failure to maintain Tarawa Road in not providing lighting and areas for pedestrians to walk and that said failure was the proximate cause of the injuries to the plaintiff. Since the United States Government owned, maintained and operated Tarawa Road, it should have installed lighting for

the safety of pedestrian traffic and to improve the hazardous conditions that existed on Tarawa Road. Plaintiff was not contributorily negligent the night of the incident in question due to the following facts: this was the first time plaintiff ever walked on the Tarawa Road; there was no lighting on the road; there was no sidewalk or an area to walk on; whatever area was adjacent to the road was dangerous to walk on; the location of plaintiff three feet in from the edge of the road was not improper as there as another soldier walking to the right of plaintiff.

Armetta Trujillo and the United States Navy are joint tortfeasors such that Ms. Trujillo is found to be twenty percent (20%) at fault for striking plaintiff's person and the United States Navy is eighty percent (80%) at fault for failing to maintain Tarawa Road with proper walkways and/or adequate lighting. Joint Tortfeasor, Armetta Trujillo, was the driver of the striking motor vehicle, but was neither a named defendant nor third-party defendant and was not an indispensable party as she was neither prejudiced or lost rights by not having been joined as a party to this litigation.[1] Pursuant to Puerto Rican substantive law, the defendant can be held jointly and severally liable for all damages even though there may exist joint tortfeasors. *Cruz, et al, v. Frau*, 31 P.R.R. 87; *Cubano v. Jiménez*, 32 P.R.R. 155; *González v. White Star Bus Line, Inc.*, 53 P.R.R. 328; and *Rivera v. Great American Indemnity Co.*, 70 P.R.R. 787, 790

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1. The Federal Rules of Civil Procedure, Rule 19, permits a plaintiff ~~to sue~~ only one joint tortfeasor without joining the others. Therefore, it was proper for plaintiff to have only sued defendant, the United States Navy, and not named the joint tortfeasor, Armetta Trujillo. Federal Rule of Civil Procedure 19(a) permits a Federal Court to proceed toward an adjudication without the presence of a necessary party so long as the party is not indispensable. (*See: Baker v. Estate of Rosenbaum*, 58 F.R.D. 496, 498 (D. Puerto Rico 1972); *Lacombe v. Manpower, Inc.*, 109 F.R.D. 350 (D. Puerto Rico 1986); *Maine v. U.S. Department of Labor*, 669 F.2d 827, 832 (1st Cir. 1982); and *Flynn v. Hubbard*, 782 F.2d 1084, 1089 (1st Cir. 1986).

(1950). The Federal Law provides that where substantive law allows contribution among joint tortfeasors, the proper procedure to follow would be to implead all potential tortfeasors. Fed. R. Civ. P. 14(a). Pursuant to Puerto Rican substantive law, there exists a right of contribution among joint tortfeasors. See 31 L.P.R.A. § 3109.

Furthermore, a joint debtor has the option of filing an independent case alleging a civil action for contribution or could join all other joint tortfeasors within the original action. As such, defendant's right of contribution and cause of action for same would not exist until defendant would pay plaintiff in this case one hundred percent (100%) of the award, even though defendant was found to only be eighty percent (80%) at fault. The cause of action for contribution under Puerto Rican law arrives at the time other joint tortfeasors have paid more than their fair share. (*See: Ramos v. Caparra Dairy, Inc.*, 116 D.P.R. 60 (1985); *Conjugal Partnership of Pedro Juan Muriente v, Conjugal Partnership of José Biascochea Escobar*, 109 D.P.R. 279 (1979); and *Garcia v. Government of the Capital*, 72 P.R.R. 133, 141 (1951).

Wherefore, in view of the foregoing, the Court finds that the defendant is at fault for the injuries of the plaintiff, and must pay one hundred percent of the award as the joint tortfeasor who is jointly and severally liable in this case. Judgment shall be entered accordingly, with regard to plaintiff's past, present and future pain and suffering. Judgment cannot be entered with regard to plaintiff's future and past medical care, as the plaintiff did not submit evidence of such possible loss for the Court's evaluation.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 30th day of August, 1991.

JAIME PIERAS, JR.
U. S. DISTRICT JUDGE

Sei H. Brown
M. Frost
D. Muntz
OB, LP
8-30-91
Duy

1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongly collected under the internal-revenue laws:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implies contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the district Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act

or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or any other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in sections 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(June 25, 1948, ch. 646, 62 Stat. 933; Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62; May 24, 1949, ch. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, ch. 655, § 50(b), 65 Stat. 727; July 30, 1954, ch. 648, § 1, 68 Stat. 589; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Aug. 30, 1964, Pub. L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub. L. 89-719, title II, § 202(a), 80 Stat. 1148; July 23, 1970, Pub. L. 91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub. L. 92-562. § 1, 86 Stat. 1176: Oct. 4, 1976, Pub. L. 94-455, title XII, § 1204(c)(1), title XIII, § 1306(b)(7), 90 Stat. 1697, 1719; Nov. 1, 1978, Pub. L. 95-563, § 14(a), 92 Stat. 2389; Apr. 2, 1982, Pub. L. 97-164, title I, § 129, 96 Stat. 39; Sept. 3, 1982, Pub. L. 97-248, title IV, § 402(c)(17), 96 Stat. 669; Oct. 22, 1986, Pub. L. 99-514, § 2, 100 Stat. 2095.)

AMENDMENTS

1986—Pub. L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

EFFECTIVE DATE

Section applicable with respect to civil actions commenced on or after Nov. 1, 1980, see section 701(b)(1)(B) of Pub. L. 96-417, set out as an Effective Date of 1980 Amendment note under section 251 of this title.

CHAPTER 171—TORT CLAIMS PROCEDURE

Sec.

2671. Definitions.
2672. Administrative adjustment of claims.
2673. Reports to Congress.
2674. Liability of United States.
2675. Disposition by federal agency as prerequisite; evidence.
2676. Judgment as bar.
2677. Compromise.
2678. Attorney fees; penalty.
2679. Exclusiveness of remedy.
2680. Exceptions.

SENATE REVISION AMENDMENT

As printed in this report, this chapter should have read "173" and not "171". It was properly numbered "173" in the bill. However, the chapter was renumbered "171", without change in its section numbers, by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1966—Pub. L. 89-506, § 9(b), July 18, 1966, 80 Stat. 308, substituted "claims" for "claims of $2,500 or less" in item 2672.

1959—Pub. L. 86-238, § 1(2), Sept. 8, 1959, 73 Stat. 472, substituted "$2,500" for "$1,000" in item 2672.

CROSS REFERENCES

Costs in tort claims cases, see section 2412 of this title.

Interest on judgments against the United States, computation, see section 2411 of this title.

Jurisdiction of district courts in tort claims cases, see section 1346 of this title.

Jury trial denied in action against the United States, see section 2402 of this title.

Review of tort claims cases, see section 1291 of this title.

Time for commencing tort action against the United States, see section 2401 of this title.

Venue in tort claims actions, see section 1402 of this title.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 995, 1346 of this title; title 2 section 190g; title 5 sections 3102, 3111, 3373, 3374, 5564; title 7 section 2272; title 10 sections 1588, 2113, 2360; title 15 sections 637, 4102; title 16 sections 565a-2, 742f, 742*l*, 773a, 1703, 3602, 3640; title 20 section 4420; title 22 sections 2504, 3508, 3761; 4606; title 23 section 307; title 25 sections 1680c, 2020; title 29 section 1706; title 31 sections 3723, 3724; title 33 section 569c; title 37 section 554; title 39 section 409; title 42 sections 2021d, 2212, 3788, 5055; title 43 section 1737; title 45 section 437; title 46 App. section 740.

§ 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative

branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

(June 25, 1948, ch. 646, 62 Stat. 982; May 24, 1949, ch. 139, § 124, 63 Stat. 106; July 18, 1966, Pub. L. 89-506, § 8, 80 Stat. 307; Dec. 29, 1981, Pub. L. 97-124, § 1, 95 Stat. 1666; Nov. 18, 1988, Pub. L. 100-694, § 3, 102 Stat. 4564.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., § 941 (Aug. 2, 1946, ch. 753, § 402, 60 Stat. 842).

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in section 2671 of title 28, U.S.C.

AMENDMENTS

1988—Pub. L. 100-694 inserted "the judicial and legislative branches," after "departments," in first par.

1981—Pub. L. 97-124 inserted "members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32," in definition of "Employee of the government" and "or a member of the National Guard as defined in section 101(3) of title 32" in definition of "Acting within the scope of his office or employment".

1966—Pub. L. 89-506 expanded definition of "Federal agency" to include military departments.

1949—Act May 24, 1949, corrected spelling of "office".

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-694 effective Nov. 18, 1988, and applicable to all claims, civil actions, and proceedings pending on, or filed on or after, Nov. 18, 1988, see section 8 of Pub. L. 100-694, set out as a note under section 2679 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-124 applicable only with respect to claims arising on or after Dec. 29, 1981, see section 4 of Pub. L. 97-124, set out as a note under section 1089 of Title 10, Armed Forces.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as a note under section 2672 of this title.

SEVERABILITY

Section 7 of Pub. L. 100-694 provided that: "If any provision of this Act [see Short Title of 1988 Amendment

note under section 1 of this title] or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation."

CONGRESSIONAL FINDINGS AND PURPOSES

Section 2 of Pub. L. 100-694 provided that:

"(a) FINDINGS.—The Congress finds and declares the following:

"(1) For more than 40 years the Federal Tort Claims Act [28 U.S.C. 1346(b), 2671 et seq.] has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

"(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

"(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

"(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

"(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

"(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

"(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

"(b) PURPOSE.—It is the purpose of this Act [see Short Title of 1988 Amendment note under section 1 of this title] to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States."

CROSS REFERENCES

Peace Corps volunteers deemed employees of the United States for purposes of this chapter, see section 2504 of Title 22, Foreign Relations and Intercourse.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to title 5 section 8477; title 20 section 4420; title 23 section 307; title 25 section 450f.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided,* That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all offices of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the

employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

(June 25, 1948, ch. 646, 62 Stat. 983; Apr. 25 1949, ch. 92, § 2(b), 63 Stat. 62; May 24, 1949, ch. 139, § 125, 63 Stat. 106; Sept. 23, 1950, ch. 1010, § 9, 64 Stat. 987; Sept. 8, 1959, Pub. L. 86-238, § 1(1), 73 Stat. 471; July 18, 1966, Pub. L. 89-506, §§ 1, 9(a), 80 Stat. 306, 308.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C. 1940 ed., § 921 (Aug. 2, 1946, ch. 753, § 403, 60 Stat. 843).

The phrase "accruing on and after January 1, 1945" was omitted because executed as of the date of the enactment of this revised title.

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in section 2672 of title 28, U.S.C.

AMENDMENTS

1966—Pub. L. 89-506 substituted "claims" for "claims of $2,500 or less" in section catchline, authorized administrative settlement of tort claims, in accordance with regulations prescribed by the Attorney General, of up to $25,000 and, with the prior written approval of the Attorney General or his designee, in excess of $25,000, inserted "compromise" and "settlement" to list of administrative acts that would be final and conclusive on all officers of the government, authorized the payment of administrative settlements in excess of $2,500 in the manner similar to judgments and compromises in like causes, and made appropriations and funds which were available for the payment of such

judgments and compromises available for the payment of awards, compromises, or settlements under this chapter.

1959—Pub. L. 86-238 substituted "$2,500" for "$1,000" in section catchline and text.

1950—Act Sept. 23, 1950, struck out requirement for specific authorization for payment of tort claims in appropriation acts.

1949—Act Apr. 25, 1949, inserted "accruing on or after January 1, 1945" after "United States" in first par.

Act May 24, 1949, substituted "2677" for "2678" in third par.

EFFECTIVE DATE OF 1966 AMENDMENT

Section 10 of Pub. L. 89-506 provided that: "This Act [amending sections 2401, 2671, 2672, 2675, 2677, 2678, and 2679 of this title, section 724a of former Title 31. Money and Finance, and section 4116 of Title 38, Veterans' Benefits], shall apply to claims accruing six months or more after the date of its enactment [July 18, 1966]."

LAWS UNAFFECTED

Section 424(b) of act Aug. 2, 1946, ch. 753, title IV, 60 Stat. 856, provided that: "Nothing contained herein shall be deemed to repeal any provision of law authorizing any Federal agency to consider, ascertain, adjust, settle, determine, or pay any claim on account of damage to or loss of property or on account of personal injury or death, in cases in which such damage, loss, injury, or death was not caused by any negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment, or any other claim not cognizable under part 2 of this title."

CROSS REFERENCES

Allowance of claims for property loss, personal injury, or death incident to noncombat activities of Army, Navy, or Air Force, see section 2733 of Title 10, Armed Forces.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2678, 2679 of this title; title 5 section 8477; title 10 sections 1054, 1089, 2733; title 15 section 2081; title 21 section 904; title 22 sections 1474, 2669, 2702; title 23 section 307; title 29 section 1706; title 31 section 1304; title 32 section 715; title 38 sections 223, 236, 351, 4116, title 39 section 2603; title 42 sections 233, 2212, 2458a, 5055.

§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

(June 25, 1948, ch. 646, 62 Stat. 983.)

REPEAL

Section 1(1) of Pub. L. 89-348, Nov. 8, 1965, 179 Stat. 1310, repealed the requirement that an annual report to Congress be made of the administrative adjustment of tort claims of $2,500 or less, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C. 1940 ed., § 922 (Aug. 2, 1946, ch. 753, § 404, 60 Stat. 843).

Changes were made in phraseology.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 8477.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

(June 25, 1948, ch. 646, 62 Stat. 983; Nov. 18, 1988, Pub. L. 100-694, § § 4, 9(c), 102 Stat. 4564, 4567.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C. 1940 ed., § 931(a) (Aug. 2, 1946, ch. 753, § 410(a), 60 Stat. 843).

Section constitutes the liability provisions in the second sentence of section 931(a) of title 28, U.S.C., 1940 ed.

Other provisions of section 931(a) of title 28, U.S.C., 1940 ed., are incorporated in sections 1346(b), 1402, 2402, 2411, and 2412 of this title, but the provision of such section 931(a) that the United States shall not be liable for interest prior to judgment was omitted as unnecessary in view of section 2411 of this title, which provides that interest on judgments against the United States shall be computed from the date of judgment. Such section 2411 is made applicable to tort-claim actions by section 932 of title 28, U.S.C., 1940 ed.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

For Senate amendment to this section, see 80th Congress Senate Report No. 1559, amendment No. 60.

AMENDMENTS

1988—Pub. L. 100-694 inserted two pars. at end entitling the United States and the Tennessee Valley Authority to assert any defense based upon judicial or legislative immunity.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-694 effective Nov. 18, 1988, and applicable to all claims, civil actions, and proceedings pending on, or filed on or after, Nov. 18, 1988, see section 8 of Pub. L. 100-694 set out as a note under section 2679 of this title.

CROSS REFERENCES

Interest on judgments, computation, see section 2411 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 8477.

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time or presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

(June 25, 1948, ch. 646, 62 Stat. 983; May 24, 1949, ch. 139, § 126, 63 Stat. 107; July 18, 1966, Pub. L. 89-506, § 2, 80 Stat. 306.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C. 1940 ed., § 931(b) (Aug. 2, 1946, ch. 753, § 410(b), 60 Stat. 844).

Section constitutes all of section 931(b), except the first sentence, of title 28, U.S.C., 1940 ed. The remainder of such section 931(b) is incorporated in section 2677 of this title.

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in section 2675(b) of title 28, U.S.C.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to this title.

AMENDMENTS

1966—Subsec. (a). Pub. L. 89-506, § 2(a), required that all administrative claims be filed with the agency or department and finally denied by the agency and sent by certified or registered mail prior to the filing of a court action against the United States, provided that the claimant be given the option of considering the claim to have been denied if the agency fails to make final disposition of the claim within six months of presentation of the claim to the agency, and provided that the requirements of the subsection would not apply to claims asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

Subsec. (b). Pub. L. 89-506, § 2(b), struck out provisions under which a claimant could, upon 15 days written notice, withdraw a claim from the agency and institute an action thereon.

1949—Subsec. (b). Act May 24, 1949, substituted "section" for "subsection".

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as a note under section 2672 of this title.

CROSS REFERENCES

District courts, jurisdiction of tort claims cases, see section 1346 of this title.

Jury trial denied in actions against the United States, see section 2402 of this title.

Time for commencing tort action against the United States, see section 2401 of this title.

Venue in tort claims actions, see section 1402 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2679 of this title; title 5 section 8477; title 23 section 307.

§ 2676. Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

(June 25, 1948, ch. 646, 62 Stat. 984.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C. 1940 ed., § 931(b) (Aug. 2, 1946, ch. 753, § 410(b), 60 Stat. 844).

Section constitutes the first sentence of section 941(b) of title 28, U.S.C., 1940 ed. Other provisions of such section 931(b) are incorporated in section 2675 of this title.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

This section was eliminated by Senate amendment. See 80th Congress Senate Report No. 1559.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 8477.

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

(June 25, 1948, ch. 646, 62 Stat. 984; July 18, 1966, Pub. L. 89-506, § 3, 80 Stat. 307.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 934 (Aug. 2, 1946, ch. 753, § 413, 60 Stat. 845).

Changes were made in phraseology.

SENATE REVISION AMENDMENT

This section was renumbered "2676" by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1966—Pub. L. 89-506 struck out provision requiring that approval of court be obtained before Attorney General could arbitrate, compromise, or settle a claim after commencement of an action thereon.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as a note under section 2672 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2672, 2678 of this title; title 5 section 8477; title 10 sections 1054, 1089; title 22 section 2702; title 31 section 1304; title 38 sections 351, 4116; title 42 sections 233, 2458a, 5055.

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

(June 25, 1948, ch. 646, 62 Stat. 984; July 18, 1966, Pub. L. 89-506, § 4, 80 Stat. 307.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C. 1940 ed., § 944 (Aug. 2, 1946, ch. 753, § 422, 60 Stat. 846).

Words "shall be guilty of a misdemeanor" and "shall, upon conviction thereof", in the second sentence, were omitted in conformity with revised title 18, U.S.C., Crimes and Criminal Procedure (H.R. 1600, 80th Cong.). See sections 1 and 2 of said revised title 18.

Changes were made in phraseology.

SENATE REVISION AMENDMENT

This section was renumbered "2677" by Senate amendment. See 80th Congress Senate Report No. 1559.

AMENDMENTS

1966—Pub. L. 89-506 raised the limitations on allowable attorneys fees from 10 to 20 percent for administrative settlements and from 20 to 25 percent for fees in cases after suit is filed and removed the requirement of agency or court allowance of the amount of attorneys fees.

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as a note under section 2672 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 8477.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims

which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is

brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States District court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule

4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

(June 25, 1948, ch. 646, 62 Stat. 984; Sept. 21, 1961, Pub. L. 87-258, § 1, 75 Stat. 539; July 18, 1966, Pub. L. 89-506, § 5(a), 80 Stat. 307; Nov. 18, 1988, Pub. L. 100-694, §§ 5, 6, 102 Stat. 4564.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 945 (Aug. 2, 1946, ch. 753, § 423, 60 Stat. 846).

Changes were made in phraseology.

SENATE REVISION AMENDMENT

The catchline and text of this section were changed and the section was renumbered "2678" by Senate amendment. See 80th Congress Senate Report No. 1559.

REFERENCES IN TEXT

The Federal Rules of Civil Procedure, referred to in subsec. (d)(3), are set out in the Appendix to this title.

AMENDMENTS

1988—Subsec. (b). Pub. L. 100-694, § 5, amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

Subsec. (d). Pub. L. 100-694, § 6, amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows: "Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the

district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court."

1966—Subsec. (b), Pub. L. 89-506 inserted reference to section 2672 of this title and substituted "remedy" for "remedy by suit".

1961—Pub. L. 87-258 designated existing provisions as subsec. (a) and added subsecs. (b) to (e).

EFFECTIVE DATE OF 1988 AMENDMENT

Section 8 of Pub. L. 100-694 provided that:

"(a) GENERAL RULE.—This Act and the amendments made by this Act [enacting section 831c-2 of Title 16, Conservation, amending sections 2671, 2674, and 2679 of this title, and enacting provisions set out as notes under sections 2671 and 2679 of this title] shall take effect on the date of the enactment of this Act [Nov. 18, 1988].

"(b) APPLICABILITY TO PROCEEDINGS.—The amendments made by this Act [amending sections 2671, 2674, and 2679 of this title] shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

"(c) PENDING STATE PROCEEDINGS.—With respect to any civil action or proceeding pending in a State court to which the amendments made by this Act apply, and as to which the period for removal under section 2679(d) of title 28, United States Code (as amended by section 6 of this Act), has expired, the Attorney General shall have 60 days after the date of the

enactment of this Act during which to seek removal under such section 2679(d).

"(d) CLAIMS ACCRUING BEFORE ENACTMENT.—With respect to any civil action or proceeding to which the amendments made by this Act apply in which the claim accrued before the date of the enactment of this Act, the period during which the claim shall be deemed to be timely presented under section 2679(d)(5) of title 28, United States Code (as amended by section 6 of this Act) shall be that period within which the claim could have been timely filed under applicable State law, but in no event shall such period exceed two years from the date of the enactment of this Act."

EFFECTIVE DATE OF 1966 AMENDMENT

Amendment by Pub. L. 89-506 applicable to claims accruing six months or more after July 18, 1966, see section 10 of Pub. L. 89-506, set out as a notice under section 2672 of this title.

EFFECTIVE DATE OF 1961 AMENDMENT

Section 2 of Pub. L. 87-258 provided that: "The amendments made by this Act [amending this section] shall be deemed to be in effect six months after the enactment hereof [Sept. 21, 1961] but any rights or liabilities then existing shall not be affected."

CROSS REFERENCES

For civil actions for injury or loss of property or personal injury or death against the Tennessee Valley Authority, see section 831c-2 of Title 16, Conservation.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 8477; title 7 section 943; title 19 sections 1920, 2350; title 20 sections 1082, 1132d-1; title 42 sections 233, 2458a, 3211.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or

malicious prosectuion. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during the time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

(June 25, 1948, ch. 646, 62 Stat. 984; July 16, 1949, ch. 340, 63 Stat. 444; Sept. 26, 1950, ch. 1049, §§ 2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub. L. 86-168, title II, § 202(b), 73 Stat. 389; Mar. 16, 1974, Pub. L. 93-253, § 2, 88 Stat. 50.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 943 (Aug. 2, 1946, ch. 753, § 421, 60 Stat. 845).

Changes were made in phraseology.

Section 946 of title 28, U.S.C., 1940 ed., which was derived from section 424(b) of the Federal Tort Claims Act, was omitted from this revised title. It preserved the existing authority of federal agencies to settle tort claims not cognizable under section 2672 of this title. Certain enumerated laws granting such authority were specifically repealed by section 424(a) of the Federal Tort Claims act, which section was also omitted from this

revised title. These provisions were not included in this revised title as they are not propertly a part of a code of general and permanent law.

SENATE REVISION AMENDMENT

Sections 2680 and 2681 were renumbered "2679" and "2680", respectively, by Senate amendment. See 80th Congress Senate Report No. 1559.

REFERENCES IN TEXT

Sections 741-752 of title 46, referred to in subsec. (d), are popularly known as the "Suits in Admiralty Act" and are classified to Title 46, Appendix, Shipping.

Sections 781-790 of title 46, referred to in subsec. (d), are popularly known as the "Public Vessels Act" and are classified to Title 46, Appendix.

Sections 1-31 of Title 50, Appendix, referred to in subsec. (e), was in the original source of this section (section 943 of act Aug. 2, 1946) a reference to the Trading with the Enemy Act, as amended. The Trading with the Enemy Act is now comprised of sections 1 to 43, which are classified to sections 1 to 6, 7 to 39, and 41 to 44 of Title 50, Appendix, War and National Defense.

The date of the enactment of this proviso, referred to in subsec. (h), means Mar. 16, 1974, the date on which Pub. L. 93-253, which enacted the proviso, was approved.

Panama Canal Company, referred to in subsec. (m), deemed to refer to Panama Canal Commission, see section 3602(b)(5) of Title 22, Foreign Relations and Intercourse.

AMENDMENTS

1974—Subsec. (h). Pub. L. 93-253 inserted proviso.

1959—Subsec. (n). Pub. L. 86-168 added subsec. (n).

1950—Subsec. (g). Act Sept. 26, 1950, § 13(5), repealed subsec. (g).

Subsec. (m). Act Sept. 26, 1950, § 2, substituted "Panama Canal Company" for "Panama Railroad Company".

1949—Subsec. (m). Act July 16, 1949, added subsec. (m).

EFFECTIVE DATE OF 1959 AMENDMENT

Amendment by Pub. L. 86-168 effective Jan. 1, 1960, see section 203(c) of Pub. L. 86-168.

EFFECTIVE DATE OF 1950 AMENDMENT

Amendment by act Sept. 28, 1950, to take effect upon the effective date of the transfer to the Panama Canal Company, pursuant to the provisions of section 256 of the Canal Zone Code, as added by section 10 of that act, of the Panama Canal together with the facilities and appurtenances related thereto, see section 14 of act Sept. 26, 1950.

TRANSFER OF FUNCTIONS

The Coast Guard was transferred to the Department of Transportation and all functions, powers, and duties, relating to the Coast Guard, of the Secretrary of the Treasury and of all other offices and officers of the Department of the Treasury were transferred to the Secretary of Transportation by Pub. L. 89-670, § 6(b)(1), Oct. 15, 1966, 80 Stat. 938. Section 6(b)(2) of Pub. L. 89-670, however, provided that notwithstanding such transfer of functions, the Coast Guard shall operate as part of the Navy in time of war or when the President directs as provided in section 3 of Title 14, Coast Guard. See section 108 of Title 49, Transportation.

For transfer of certain functions relating to claims and litigation, insofar as they pertain to the Air Force, from the Secretary of the Army to the Secretary of the Air Force, see Secretary of Defense Transfer Order No. 34 [§ 1a(2)(4)], eff. July 1, 1949.

NORTHERN MARIANA ISLANDS – APPLICABILITY OF SUBSEC. (k)

Pub. L. 97-357, title II, § 204, Oct. 19, 1982, 96 Stat. 1708, provided: "That the Northern Mariana Islands shall not be considered a foreign country for purposes of subsection (k) of section 2680 of title 28, United States Code, with respect to claims which accrued no more than two years prior to the effective date of this Act [Oct. 19, 1982]."

TERMINATION OF NATIONAL EMERGENCY

Declaration of national emergency in effect on Sept. 14, 1976, was terminated two years from that date by section 1601 of Title 50, War and National Defense.

APPLICABILITY OF SUBSEC. (j)

Joint Res. July 3, 1952, ch. 570, § 1(a)(32), 66 Stat. 333, as amended by Joint Res. Mar. 31, 1953, ch. 13, § 1, 67 Stat. 18, and Joint Res. June 30, 1953, ch. 172, 67 Stat. 132, provided that subsec. (j) of this section, in addition to coming into full force and effect in time of war, should continue in force until six months after the termination of the national emergency proclaimed by the President on Dec. 16, 1950 by 1950 Proc. No. 2914, 15 F.R. 9029, set out as a note preceding section 1 of Title 50 Appendix, War and National Defense, or such earlier date or dates as may be provided for by Congress, but in no event beyond Aug. 1, 1953. Section 7 of Joint Res. July 3, 1952, provided that it should become effective June 16, 1952.

Joint Res. July 3, 1952, ch. 570, § 6, 66 Stat. 334, repealed Joint Res. Apr. 14, 1952, ch. 204, 66 Stat. 54 as amended by Joint Res. May 28, 1952, ch. 339, 66 Stat. 96; Joint Res. June 14, 1952, ch. 437, 66 Stat. 137; Joint Res. June 30, 1952, ch. 526, 66 Stat. 296, which continued provisions of subsec. (j) of this section until July 3, 1952. This repeal was made effective June 16, 1952, by section 7 of Joint Res. July 3, 1952.

CROSS REFERENCES

For civil actions for injury or loss of property or personal injury or death against the Tennessee Valley Authority, see section 831c-2 of Title 16, Conservation.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 5 section 8477; title 10 sections 1054, 1089; title 15 section 2053; title 21 section 904; title 22 sections 1474, 2702; title 38 section 4116; title 42 sections 233, 2458a.